United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 75-4169

In the

United States Court of Appeals

For the Second Circuit

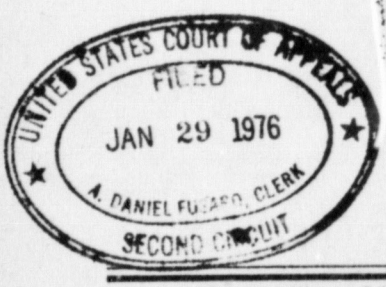
TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF
THE CIVIL AERONAUTICS BOARD.

BRIEF AMICUS CURIAE ON BEHALF OF UNITED AIR LINES, INC. URGING AFFIRMANCE.



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BRIEF AMICUS CURIAE ON BEHALF OF UNITED AIR LINES, INC. URGING AFFIRMANCE.

THE ISSUE PRESENTED FOR REVIEW.

1. Whether the Civil Aeronautics Board by the adoption of regulations[1] authorizing U. S. scheduled and supplemental air carriers and foreign scheduled and charter air carriers to perform One-stop-inclusive Tour Charters has properly exercised its rule-making authority and has not exceeded its statutory authority under §§ 101(36) and 401(d)(3) and 402(b) of the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301(36), 1371 (d)(3) and 1372(b).

1. CAB Regulation SPR-85, enacting Part 378a of CAB Special Regulations, 14 C. F. R. Part 378a, adopted August 7, 1975, effective September 13, 1975.

INTEREST OF AMICUS CURIAE.

United Air Lines, Inc. ("United") is a Delaware corporation with its principal offices at Elk Grove Village, Illinois. United is a regularly scheduled United States air carrier holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (the "Board") pursuant to Section 401(d)(1) of the Federal Aviation Act of 1958 (the "Act"), 49 U. S. C. § 1371(d)(1), authorizing it to engage in interstate and foreign air transportation on both a scheduled and charter basis. Founded in 1926, United is the largest domestic air carrier, providing daily service to 113 cities and carrying approximately 31,510,000 passengers in 1974. United also provides a substantial portion of the charter service within the United States; for example, United flew 53.2% of the total passengers carried on domestic civilian charter flights operated by the trunk carriers during the period embracing 1972, 1973, and through the month ending September, 1974.

United has actively participated in every stage of the Board's administrative proceedings which led to the adoption of the regulations in issue herein. In response to the Board's Notice of Proposed Rule-Making ("NPRM") EDR-276, SPDR-37, ODR-8, dated June 18, 1974, United submitted comments on August 8, 1974 in Docket No. 26810 supporting the Board's Special Event Charter ("SEC") proposal and urging its adoption. On August 23, 1974, United submitted reply comments which expressed its view that the proposed SEC Special Regulations were clearly within the Board's statutory authority, and met the criteria of *Saturn Airways, Inc.* v. *C. A. B.*, 483 F. 2d 1284 (D. C. Cir. 1973) relating to the maintenance of the required distinction between charter and individually ticketed, *i.e.*, scheduled service, travel.

On October 30, 1974, the Board issued NPRM EDR-281, SPDR-38, ODR-9 which gave notice of the Board's considera-

tion of a new form of charter transportation to be known as a One-stop Inclusive Tour Charter ("OTC"). United participated in this rule-making proceeding by filing its comments in Docket No. 27135 on December 11, 1974, and its reply comments on January 6, 1975. Again, United supported the actions proposed by the Board, United's judgment being based on its experience, and on surveys conducted by it which developed information from which United was able to conclude that OTC flights would not divert traffic from scheduled service. In these filings, United also stated that, among other things, because the OTC concept was to be undertaken on an experimental basis, its institution clearly was supported by considerations enunciated in *Saturn Airways, Inc.* v. *C. A. B., supra,* 483 F. 2d at 1291.

By supplemental notices of proposed rule-making (EDR-281B, SPDR-38B, ODR-9B, dated April 10, 1975 and EDR-276C, SPDR-37C, ODR-8C, dated April 21, 1975) the Board indicated that it was considering certain changes in its previous SEC and OTC proposals and that it would consolidate the two dockets (CAB Docket No. 27135 and No. 26810). United responded to this action by the Board with comments filed on May 6, 1975 and with reply comments filed on June 2, 1975. United's position again was that the Board had the statutory authority to promulgate its proposals.

On August 7, 1975, the Board adopted a new Part 378a of its Special Regulations which authorized the operation of OTC and SEC charters by U. S. scheduled and supplemental air carriers and foreign scheduled and charter carriers, which is the regulation under review here. United is presently one of the largest carriers of charters authorized under Part 378a with approximately 800 flights on file with the Board.[2]

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2. It should be noted that petitioner, Trans World Airlines, has also established itself as one of the major carriers in this field, with approximately 450 flights authorized to operate under Part 378a during the last three months of 1975 and the first half of 1976. Aviation Daily, Dec. 22, 1975 at 278.

ARGUMENT.

The term "charter" appears several places in the Act. Section 401(e)(6) of the Act (49 U. S. C. 1371(e)(6)) authorizes scheduled air carriers to conduct off-route "charter trips." Section 401(d)(3) of the Act (49 U. S. C. 1371(d)(3)) authorizes supplemental air carriers to engage in "supplemental air transportation," which is defined in Section 101(34) of the Act (49 U. S. C. 1301(34)) as "charter trips . . . in air transportation."

The term "charter" is not defined by the Act and was left to be refined by the Board so as to allow sufficient flexibility within the framework of the basic distinction between group travel and individually ticketed travel. *Pan American World Airways* v. *C. A. B.*, 517 F. 2d 734 (2d Cir. 1975); *Saturn Airways* v. *C. A. B.*, 483 F. 2d 1284 (D. C. Cir. 1973); *Trans International Airlines* v. *C. A. B.*, 432 F. 2d 607 (D. C. Cir. 1970); *Pan American World Airways* v. *C. A. B.*, 380 F. 2d 770 (2d Cir. 1967), *aff'd by an equally divided Court*, 391 U. S. 461 (1968); *American Airlines* v. *C. A. B.*, 365 F. 2d 939 (D. C. Cir. 1966); *American Airlines* v. *C. A. B.*, 348 F. 2d 349 (D. C. Cir. 1965). Thus, Congress has left it to the Board to "evolve a [charter] definition in relation to such variable factors as changing needs . . . ," *American Airlines* v. *C. A. B.*, *supra*, 348 F. 2d at 354. The Board's actions in this regard, as the above-cited cases demonstrate, have frequently been judicially reviewed. As was pointed out in *Saturn Airways* v. *C. A. B.*, *supra*, with each new evolution of the charter concept, a petition for review has been lodged with a Court of Appeals, which is "called upon to exercise [its] judgment concerning the 'liberalization' (if that beleaguered term is indeed apropos) of

regulations governing the jurisdiction of supplemental air carriers to provide 'charter trips . . . in air transportation.' 49 U. S. C. § 1301(34)(1970).," 483 F. 2d at 1286.

The Board previously has exercised its rule-making authority to create several forms of charters: affinity charters (14 C. F. R. Part 207, Subpart B), entity charters (14 C. F. R. Part 207, Subpart C), inclusive tour charters (14 C. F. R. Part 378), study group charters (14 C. F. R. Part 373), overseas military personnel charters (14 C. F. R. Part 372), and travel group charters (14 C. F. R. Part 372a). These various provisions authorize air carriers to bring the economy of planeload operations to the persons defined as eligible participants in the above-cited regulations. As the Board has itself recognized, the numerous artificial definitions and restrictions developed by the Board in this area, see especially 14 C. F. R. Part 207, Subpart B and Part 372a, Subpart B, unfortunately have essentially operated to deny the benefits of these low cost forms of transportation to the general public, and the technical nature of these rules have made them difficult to enforce. (See *Saturn Airways* v. *C. A. B., supra,* 483 F. 2d at 1292, and *National Air Carrier Association* v. *C. A. B.,* 436 F. 2d 185, 193 (D. C. Cir. 1970).

The purpose of the limitations placed on the previous charter forms was to insure that these modes of transportation would not divert traffic from individually ticketed scheduled service. It has been United's position throughout the administrative proceeding described above that Part 378a concomitantly permits a greater proportion of the general public to utilize this low cost air transportation while adequately protecting against impairment of essential scheduled service. United, on the basis of its expertise and experience accumulated over many years as the largest domestic charter carrier, believes that the Board's formulation of Part 378a adequately preserves the integrity of scheduled service while it brings to the public the benefits of planeload charters.

The transportation industry consists of various definable market segments, which are characterized by separate and distinct transportation needs. Prime examples of these markets most likely to prefer scheduled service are business travelers who require the fastest transportation available in order to meet very strict schedules, and luxury vacation travelers who, in addition to placing a premium on time of departure or arrival, also have very specific requirements as to the style of their transportation to their vacation spot.

On the other hand, the market for charter services is fundamentally different and can be identified by the passenger's high degree of price sensitivity, by a willingness to plan for and commit to an inflexible pleasure travel program in advance of the date of departure, and by a willingness to travel in a fully occupied, high density aricraft in which only one class of service is provided. The flexibility, convenience and amenities available in scheduled service are of secondary importance to such price-conscious passengers.

The development of workable, equitable, and non-diversionary charter rules requires the identification of those travel-related characteristics that distinguish the demand for individually ticketed scheduled service from that for planeload services. Restrictions in charter rules which are directed at the maintenance of these fundamental differences will preserve the integrity of scheduled services while simultaneously promoting the optimum development of the charter market. United submits that Part 378a meets these criteria, for the Board, in promulgating Part 378a, has established appropriate restrictions on the conditions of travel which more than adequately maintain the necessary distinctions.

Thus, Section 378a.10(a) requires that each OTC participant purchase from an independent tour operator, in addition to his air transportation, ground accommodations (defined in Section 378a.1 to include sleeping accommodations and necessary surface transportation) for the duration of the tour. Quite obviously,

this restriction excludes a significant portion of the traveling public which wishes to make its own individual arrangements or which wants to utilize the free accommodations which can be provided by friends and relatives.

Sections 378a.10(b) and 378a.10(c) provide that an OTC charter contract must be for 40 or more seats and that the charter must be operated on a round-trip basis. These provisions necessarily exclude those passengers who place a premium on choosing their individual preference of departure and arrival times and who do not desire to incur the inconveniences of traveling in a large group.

Section 378a.10(d) imposes the condition that North American charters must be of a minimum duration of four days. This limitation excludes persons whose transportation needs involve a trip of any shorter duration.

Section 378a.10(g)(1) and (2) sets a minimum cost of the tour. This provision discourages passengers from utilizing the OTC for air transportation purposes only, for the minimum allowable cost for mandatory ground accommodations and services of $15.00 for each night of the tour for adult passengers and $7.50 for children under age 12 is high enough so as to make "throwing away," *i.e.*, non-utilization, of ground arrangements unlikely.

Section 378a.26(b) effectively requires the prospective charter participants to make their travel plans more than 15 days (for North American charters) prior to the departure, for their names must be identified in a passenger list to be filed with the Board no later than 15 days prior to the beginning of the charter, and they must make full payment of the total price of the tour by the same date. As shown in the aforementioned United surveys, the non-discretionary traveler typically must make his travel plans much later than 15 days before commencement of this transportation, and a large portion of the domestic traveling public, particularly business passengers, makes travel plans in the last few days prior to departure. United's surveys

indicated that the vast majority of its passengers in scheduled service make their reservations within seven to ten days of departure.[3] Therefore, a rule requiring the filing of a passenger list for OTC's fifteen days before departure should insure that the applicability of OTC's to that segment of traffic which can be properly categorized as scheduled traffic will be reasonably limited.

It is significant to note that these six major restrictions are cumulative in their impact. The prospective OTC passenger must be able to accept the accommodations arranged by the tour operator, *and* be able to travel with 40 other passengers, *and* be able to depart and arrive at unvariable predetermined times, *and* be able to stay away no less than four days from the point of origin, *and* be able to pay for (and utilize) the minimum *per diem* for ground accommodations, *and* be able to make his or her travel plans no less than 15 days in advance of the departure. The combined effect of these restrictions is to circumscribe OTC's to a segment of the travel market which would not ordinarily be expected to travel by means of scheduled air transportation. United submits that the Board, by establishing these travel-pattern-related restrictions, has demonstrably met its statutory mandate of maintaining "the necessary distinction between group and individually ticketed travel," *Saturn Airways* v. *C. A. B., supra,* 483 F. 2d at 1292. The restrictions incorporated in Part 378a are comparable to the "five 'substantial and vital' differences between [travel group charters] and conventional travel" that the District of Columbia Circuit in *Saturn Airways* v. *C. A. B., supra,* found to be sufficient grounds on which to affirm the Board's exercise there of its charter rule-making authority. As this Court said only recently in affirming the Board's regulations authorizing foreign originating travel group charters, the restrictions contained in those regulations, "*taken together* . . . maintain the required distinc-

3. Comments of United Air Lines, Inc. in CAB Docket 27135, December 11, 1974, at 7-8.

tion between charter services and that of the regularly scheduled airlines . . . [and] preserve the character of charter service." *Pan American World Airways, Inc.* v. *C. A. B., supra,* 517 F. 2d at 746. (Emphasis added)[4]

Part 378a contains another significant provision which is of importance in the light of the *Saturn Airways* case. The travel group charter ("TGC") regulations there at issue were temporary in nature, and the Court considered this as a basis for giving even further deference to the Board's expertise in this area, 483 F. 2d at 1293. Section 378a.7 provides that the part

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4. In this respect, the position taken by petitioner in its brief at 14-19 is misleading. As shown above, petitioner's statement (brief at 15) that "Under the Board's OTC regulation, the sole requirement . . . is the requirement that OTC participants must go and return as a group, subject to the restriction as to length of the trip," reiterated at 18-19, is simply not accurate. Moreover, the emphasis in petitioner's discussion upon the absence in the OTC regulations of the same or similar restrictions as are contained in the board's travel group charter regulations, sustained in *Saturn Airways, supra,* misses the point. As this Court made clear in its recent *Pan American* opinion, it is not the presence or absence of any particular restriction which governs; rather it is the cumulative impact of the various limitations and restrictions which is to be considered in determining whether the dichotomy between charter and scheduled service has been adequately maintained. In this connection, it might be noted, for example, that unlike OTC's, travel group charters have no requirement that ground arrangements be purchased. 14 C. F. R. 372a.10.

Likewise, it is an oversimplification to say, as petitioner does (brief at 11) that "Under the OTC's, any North American passenger may go to a travel agent 15 days in advance of his flight and buy a round-trip ticket. This is clearly individually ticketed travel." In *Pan American, supra,* this Court endorsed the formulation contained in S. Rep. No. 1567, 86th Cong. 2d Sess., 5 (1960) for distinguishing charter service: "The touchstone is simply that charter service must be 'of a kind and character which does not amount to conventional . . . service as provided by the major airlines.'" 517 F. 2d at 741. As the foregoing discussion has shown, it is manifest that the OTC concept as devised by the Board is considerably different from "conventional service" in numerous respects.

will terminate on March 31, 1980, in order that the experience gained through this experimental period will give the Board a basis on which to make any interim amendments and to ultimately decide whether to make Part 378a permanent.

Indeed, the Board's action in promulgating the instant regulations goes one step beyond the safeguards provided in the TGC regulations. Section 378a.5 establishes procedures whereby the Board, on its own initiative, or in response to a petition, may impose limitations on OTC operations. This continuing ability to protect individual markets from undue diversion from scheduled services overcomes the underlying concerns often expressed by those who have opposed the evolution of charters into a viable form of transportation. More importantly, this ability to control the OTC experiment further underscores considerations expressed by Judge Tamm in *Saturn Airways* v. *C. A. B., supra,* 483 F. 2d at 1291-1292:

> We want to stress two items that have particularly influenced us, and which we have drawn from our review of this case and other experiences with this type of litigation. First, the test we must apply is result oriented—one cannot really know how the public will react and how the TGCs will affect scheduled travel until they are tested in the crucible of the marketplace. This is a situation in which, in Judge Leventhal's words, "a month of experience will be worth a year of hearings" . . . Secondly, the consistent lamentations and predictions of doom by diversion raised by the scheduled air carriers in the past have proved, to our way of thinking, to be considerably overstated. The actions of the Board in this area have provided for steady growth in both the scheduled and supplemental markets, and the public, as it should be, has been the primary beneficiary.

United asserts that the Board's exercise of its rule-making authority in this case is clearly within its statutory authority, that the Board has provided exceptional protection for scheduled service, and that Part 378a will provide air carriers with a new and viable means to bring the benefits of low cost air transportation to the public.

CONCLUSION.

The Board's OTC regulation should be affirmed.

Respectfully submitted,

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No. 75-4169

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COUNTY OF COOK. }

Fay Randy Hart being first duly sworn, deposes and says that he served two copies of the Brief

in the above entitled cause, as per statute herein made and provided, on

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Subscribed and sworn to before me this 27th

day of January, A. D. 19 76.

Leonard P. Kenton

Notary Public.

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